Supreme Court, U. S.
FILED
FEB 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-958

COMMERCE UNION BANK, Trustee of Justin Potter Grandchildren's Trust;
ISLAND CREEK COAL COMPANY, a Delaware Corporation; and
BADGETT MINE STRIPPING CORPORATION, a Kentucky Corporation, - - - Petitioners

versus

JAMES C. KINKADE and Wife, **ROSA LEE KINKADE**;
LONNIE RAY HARPER;
ELZA THOMAS GRAY, JR. and Wife, **MARTHA GERINE GRAY**; and
ROBERT ARMSTRONG and Wife, **ELIZABETH ARMSTRONG**, - - - - - Respondents

---

BRIEF IN OPPOSITION

RALPH W. WIBLE
SANDIDGE, HOLBROOK & CRAIG, P.S.C.
100 St. Ann Bldg., P. O. Box 727
Owensboro, Kentucky 42301

KENNETH B. KUSCH
KUSCH & MILLER
107 Railroad Street
Central City, Kentucky 42330
Attorneys for Respondents

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-958

COMMERCE UNION BANK, Trustee of Justin Potter Grandchildren's Trust;
ISLAND CREEK COAL COMPANY, a Delaware Corporation; and
BADGETT MINE STRIPPING CORPORATION, a Kentucky Corporation, - - - *Petitioners*

v.

JAMES C. KINKADE and Wife, ROSA LEE KINKADE;
LONNIE RAY HARPER;
ELZA THOMAS GRAY, JR. and Wife, MARTHA GERINE GRAY; and
ROBERT ARMSTRONG and Wife, ELIZABETH ARMSTRONG, - - - - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Kentucky is reported at 540 Southwestern 2d 861.

JURISDICTION

Title 28 U.S.C. §1257 (3) does not invoke the Court's jurisdiction in this case. The federal question was neither raised nor decided in the court below. The case was decided on non-federal grounds involving Kentucky law as to the construction of mineral deeds.

QUESTIONS PRESENTED

I. Was a federal question raised below?

II. Does the judgment rest on adequate state grounds?

III. Were the Petitioners denied due process of law by the Muhlenberg Circuit Court and the Supreme Court of Kentucky?

IV. Is there a substantial federal question presented by this action?

COUNTERSTATEMENT OF THE CASE

The Respondents are small landowners in Muhlenberg County, Kentucky. The Kinkades own four acres, Harper 45 acres, and Gray and Armstrong 35 acres. They brought this action to determine whether three coal deeds made in 1906 should be implied to give the right to strip mine their land. The Muhlenberg Circuit Court and the Supreme Court of Kentucky held that the right to strip mine could not be implied because the deeds "do not contain language that is so extensive as to subordinate the rights of the surface estate to the demands of the mineral estate." 540 S. W. 2d at 864.

Petitioners take the position that the decisions of the trial court and of the appellate court deprived them of property without due process of law. They say that similar deeds were held in 1956 to give the right to strip mine. They argue that it was the law of Kentucky up until the time of the instant decision that a deed conveying "all coal" would be implied to convey the right to strip mine.

The trial court found that strip mining was unknown at the time of the deeds. The Supreme Court of Kentucky ignored this question. In prior decisions it had held that the question of whether strip mining was known is irrelevant. See, e.g., *Martin* v. *Kentucky Oak Mining Co.*, Ky., 429 S. W. 2d 395 at 397 (1968).

There was no evidence of the number of tons of coal that would be lost if Respondents' tracts could not be strip mined. The tonnage figures in the Petition for Certiorari refer to the entire coal field being mined by Petitioners, a significant part of which has already been strip mined by them.

ARGUMENT

I.

The Question Here Asserted to Be a Federal Question Was Neither Raised Nor Decided Below.

Petitioners have not complied with Rule 23 (1)(f) of this Court by stating in detail the manner and method in which the federal question was raised and the way in which it was decided. They have not met their burden of showing that the federal question was raised below because they could not meet that burden.

Nothing in the pleadings in the trial court could be construed to raise the federal question. In the appellate court, Petitioners can only point to the brief filed by Badgett Mine Stripping Corporation. That brief contains a subject heading in the Argument portion of the brief stating that "The Judgment of the Muhlenberg Circuit Court Denies the Mineral Owner a Vested Property Right Without Due Process of Law." The one paragraph argument beneath the heading does not use any phrase referring to the Constitution of the United States nor does it cite any cases decided under the Constitution. Under the heading in the brief that the Doctrine of Stare Decisis required the decision sought by Badgett Mine Stripping Corporation, the following sentence appeared: "At this time, to change the law, would in effect take property from these investors without due process." This statement was followed by citations to two Kentucky cases, neither of which was based on the Constitution of the United States. The term "due process" was not mentioned in the briefs of Petitioners Commerce Union Bank and Island Creek Coal Company. The Petitioners filed a twenty-two page Joint Petition for Rehearing in the Supreme Court of Kentucky which contained only one sentence which might be said to raise the federal question. That sentence was: "To severely limit their rights at this time by changing existing law would in effect be to take the property from these investors without due process of law." This was followed by citations to two Kentucky cases, neither of

which was based upon the Constitution of the United States.

While the words "due process" do not appear in the Kentucky Constitution, a long line of decisions by Kentucky's highest court has held that the Kentucky Constitution prohibits the taking of property without due process of law. *Board of Levee Com'rs.* v. *Johnson,* 178 Ky. 287, 199 S. W. 8 (1917); *Pritchett* v. *Marshall,* Ky., 375 S. W. 2d 253 (1964); *Moore* v. *Ward,* Ky., 377 S. W. 2d 881 (1964); *American Beauty Homes Corp.* v. *Louisville,* Ky., 379 S. W. 2d 450 (1964); and *Lamar* v. *Board of Education of Hancock Co. Sch. Dist.,* Ky., 467 S. W. 2d 143 (1971). The mere reference to "due process" in the briefs without any reference to the Constitution of the United States and asserting no express rights thereunder will be presumed to refer solely to the rights under the Kentucky Constitution. *Bowe* v. *Scott,* 233 U. S. 658 (1913). This presumption is buttressed by the fact that the decision of the Supreme Court of Kentucky was silent on the constitutional question. It must be assumed that the Court was silent because the constitutional question was not properly raised before it.

II.

The Judgment Herein Rests on Adequate State Grounds.

The decision of the Supreme Court of Kentucky herein is simply another step in the development of the local law of Kentucky with regard to mineral rights. It was not a reversal of any prior decisions.

The opinion below does not purport to reverse the line of cases holding certain deeds to impliedly grant the right to strip mine. This line of cases is listed in *Martin* v. *Kentucky Oak Mining Co.*, Ky., 429 S. W. 2d 395 (1968). The opinion affirmed that it has consistently upheld "what has been identified as the 'broad form' or 'Mayo deed'." 540 S. W. 2d at 864. It found the deeds here in question to contain different terms from those which had been held to grant the right to strip mine.

The Kentucky cases did not begin to hold that the right to strip mine could be implied from the language of a deed until 1956 in *Buchanan* v. *Watson,* Ky., 290 S. W. 2d 40 (1956). That opinion was obscure in its reasoning. It reasoned in part that the coal could be removed by strip mining if that was the only feasible process. Two cases came down in 1960 that made it clear, however, that the feasibility of removing the coal by strip mining or other methods was not relevant. *Blue Diamond Coal Co.* v. *Neace,* Ky., 337 S. W. 2d 725 (1960) and *Kodak Coal Co.* v. *Smith,* Ky., 338 S. W. 2d 699 (1960). *Blue Diamond Coal Co.* v. *Neace* made it clear that the court implied the right to strip mine from the broad sweep of the language of the deed. As was later to be said in *Martin* v. *Kentucky Oak Mining Co., supra,* the question was whether the parties to the instrument "intended that the mineral owner's rights to use the surface in removal of the minerals would be superior to any competing rights of the surface owner." 429 S. W. 2d at 397.

The body of Kentucky law was brought before the United States Court of Appeals for the Sixth Circuit in two diversity cases. *Peabody Coal Co.* v. *Pasco,* 452 F. 2d 1126 (6th Cir. 1971) and *Peabody Coal Co.* v. *Erwin,* 453 F. 2d 398 (1971). In the *Pasco* opinion, the Court noted that the Kentucky Court was in the process of crystalizing its approach to the question of when the right to strip mine would be implied. 452 F. 2d at 1129. As the Kentucky Court felt its way in defining the rules more precisely on a case-by-case basis, the factors to be considered began to emerge with greater clarity and inconsistencies were resolved. This is just as the common law system is supposed to work. Petitioners would, however, have the Court to hold that any change or clarification in the common law process is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. This is a strange and static view of the law.

The case of *Watson* v. *Kenlick Coal Co., Inc.,* 498 F. 2d 1183 (6th Cir. 1974) cert. den'd 422 U. S. 1012 presaged further developments in the Kentucky law. There, the landowners claimed that they were deprived of their property without due process of law by force of the Kentucky precedents as they would be applied to the mineral severance deed for their land. The United States Court of Appeals for the Sixth Circuit declined to guess how the Kentucky Court might construe the Plaintiffs' deeds or any other deeds on other facts besides those involved in the cases which had been before the Kentucky court. It held this was

strictly a matter of the local law of Kentucky. The *Pasco, Erwin,* and *Watson* cases from the Sixth Circuit show that the Kentucky Court has never established any rule that the words "all coal" or any other language found in the deeds in this case would be sufficient to imply the right to strip mine.

The Supreme Court of Kentucky was divided in the instant case, but the only disagreement among the Justices was over the question of whether the Court should go beyond the decision in this case and reverse the previous line of cases by holding that the right to strip mine would not be implied. Chief Justice Reed's concurring opinion shows he favored doing this except for the retroactive effect on vested rights. He obviously did not believe that the decision in which he concurred had such a retroactive effect.

The decision below is simply another step in the development of Kentucky's law with regard to strip mining. It further clarifies the developing body of law. It rests entirely on adequate state grounds.

III.

Petitioners' Claim of Lack of Due Process Is Groundless.

Assuming, arguendo, that the decision of the Supreme Court of Kentucky changed the existing law, this is not a taking of property without due process of law. Even an erroneous state court decision reversing a former decision is not a taking of property without due process. *Central Land Co.* v. *Laidley,* 159 U. S. 103 (1894); *Tidal Oil Co.* v. *Flanagan,* 263 U. S.

444 (1923); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673 (1929); and Annot. 10 A.L.R. 3d 1371 at 1392 (1966).

IV.

This Action Does Not Present a Substantial Federal Question.

The questions here are those of state property law and its evolution through traditional common law processes. There are no grounds for granting a Writ of Certiorari. By their Petition the coal companies have put these small property owners to further expense and delay in finally bringing this matter to rest. The Respondents should have reasonable damages for their delay pursuant to Rule 56 (4) of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RALPH W. WIBLE
SANDIDGE, HOLBROOK & CRAIG, P.S.C.
100 St. Ann Bldg., P. O. Box 727
Owensboro, Kentucky 42301

KENNETH B. KUSCH
KUSCH & MILLER
107 Railroad Street
Central City, Kentucky 42330

Attorneys for Respondents